SUPREME COURT, U. S.

DEC 11 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 728

IRA CLEMENS (Individually and on Behalf of Others Adversely Affected),

Petitioner

v.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, LEHIGH AND NEW ENGLAND RAILWAY COMPANY AND LEHIGH AND NEW ENGLAND RAILROAD COMPANY,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A to Petition, pp. 24-30) is reported at 399 F. 2d 825. The opinion of the District Court (Appendix B to Petition, pp. 31-73) is reported at 264 F. Supp. 551. The opinion of the Court of Appeals in the prior case *Roberts* v. *Lehigh and New England Ry.* (Appendix C to Petition, pp. 74-81) is reported at 323 F. 2d 219 and the District Court's opinion in the companion case *Roberts* v. *Lehigh and New England Ry.* (Appendix D to Petition, pp. 82-88) is reported at 211 F. Supp. 379.

COUNTER STATEMENT OF QUESTION PRESENTED

Are not the plaintiffs barred by *res judicata* as a result of a prior decision of the Court of Appeals against them which sustained agreements whose invalidity was and is essential to plaintiffs' recovery when the present case involves the same agreements and the same parties, claim and controversy, the only allegedly new matter being an asserted violation of the Interstate Commerce Act instead of the Railway Labor Act?

COUNTER STATEMENT OF STATUTES INVOLVED

No statute is involved. The judgment of the Court of Appeals rests entirely upon the doctrine of *res judicata.*[1]

COUNTER STATEMENT OF THE CASE

On September 26, 1961, the Interstate Commerce Commission approved the abandonment by the Lehigh and New England Railroad Company of its trackage except for some forty miles the acquisition of which portion by defendant Lehigh and New England Railway Company ("Railway") was concurrently approved. In approving the applications the ICC provided the so-called "New Orleans" conditions for the payment of severance pay to employees affected by the abandonment.

In 1962, the plaintiffs, former employees of Railway, filed their Complaint in the prior case of *Roberts* v. *Lehigh and New England Railway Company,* 211 F. Supp. 379 (E.D. Pa., 1962), *aff'd,* 323 F. 2d 219 (C.A. 3, 1963). In

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[1] Briefed and argued before the Court of Appeals by the Respondents but not reached by that Court, were the questions (1) whether, aside from the binding effect of the Court's prior decision, the retirement agreements were valid as a matter of law, particularly the Interstate Commerce Act, and (2) whether the District Court in its Opinion and Order requiring arbitration had predetermined substantive and procedural matters that should have been left to the arbitrator.

that case, the plaintiffs complained of mandatory retirement agreements entered into between the Railway and certain brotherhoods. It was alleged that the agreements were invalid and that the plaintiffs were wrongfully deprived of severance pay by reason of their retirements under the invalid agreements. The District Court upheld the validity of the retirement agreements and the Court of Appeals affirmed.

As observed by the Court of Appeals in the present case, "[t]here is no significant difference between the parties" in this case and the parties in the *Roberts* action, and the plaintiffs complain of exactly the same wrong, *i.e.*, their involuntary retirement without severance pay pursuant to the retirement agreements between Railway and the brotherhoods (Appendix A to Petition, at pages 26-27, 399 F. 2d 825, 826).

Only two differences between the first case and this case are noted by the Court of Appeals, neither one of which was found sufficient to lift the bar of *res judicata*. The remedy sought in the *Roberts* case was a declaratory judgment that the retirement agreements were invalid and an award of punitive damages measured by the severance pay the plaintiffs would have received but for the allegedly illegal agreements. The Court of Appeals pointed out that although an order requiring arbitration is the relief requested in the present case, the ultimate relief sought by plaintiffs in both cases was nevertheless severance pay. It was contended also by the plaintiffs that the present case was significantly different because in the *Roberts* case the retirement agreements were attacked as a violation of the Railroad Labor Act while in the present case they are attacked as a violation of the Interstate Commerce Act. The Court of Appeals, however, held that the controversy was the same and that any such difference between the two cases was insufficient to avoid *res judicata*. (Opinion of the Court of Appeals, Appendix A to Petition, at page 28, 399 F. 2d 825, 827).

ARGUMENT

Realizing that the decision of the Court of Appeals has no significant impact on any case other than the present one, the petitioners have made a valiant effort to bring before this Court questions involving the so-called "plenary power" of the ICC in relation to the Railway Labor Act. The decision of the Court of Appeals, however, involves no consideration of the Interstate Commerce Act, the Railway Labor Act, or any matters having to do with the Interstate Commerce Commission, its powers or its limitation.

The decision of the Court of Appeals rests entirely upon the principles of *res judicata* and is required by the decisions of the Courts of Appeals and the decisions of this Court on such matter. See Opinion of the Court of Appeals, Appendix A to Petition, at page 29, 399 F. 2d at 827-828.

Actually, it appears that petitioners' effort is to gain review not of the present case but of the earlier decision of the Court of Appeals in *Roberts* v. *Lehigh and New England Railway Company,* 323 F.2d 219 (C.A. 3, 1963). Petitioners complain that they are compelled to take their claims against the respondents to the National Railroad Adjustment Board. But that route was ordained to them by the *Roberts* decision in 1963 of which no review by this Court was sought. The present decision simply precludes the relitigation of the validity of the retirement agreements which are and were the central pivot of the petitioners' claims, leaving it to the petitioners to take the route suggested in the earlier case, *i.e.,* an appeal to the National Railroad Adjustment Board as to any disputed matters involving the interpretation of those agreements.

The petitioners seek to litigate in this Court questions long since litigated and put to rest against them in the earlier *Roberts* litigation. The decision of the Court of Appeals in the present litigation generates no broad ques-

tions of policy under the Interstate Commerce Act or conflicting decisions in respect thereof. The sole and narrow question is the impact of the doctrine of *res judicata* on the individual circumstances of this case.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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